

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 August Term, 2002
4

5 (Argued: March 21, 2003) (Decided: August 25, 2003)

6 Docket Nos. 01-7827 (LEAD), 01-7875 (CON), 01-9023 (XAP)

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8 PAUL A. KROHN,
9 Plaintiff-Appellee-Cross-Appellant,

10 ALLI KATT,
11 Plaintiff-Appellee,
12

v.

13 NEW YORK CITY POLICE DEPARTMENT and ANTHONY DIPALMA,
14
15 Defendants-Appellants-Cross-Appellees.

16 -----
17 BEFORE: FEINBERG, VAN GRAAFEILAND, F.I. PARKER,* Circuit Judges.

18 Cross-appellant, Paul A. Krohn, bankruptcy trustee for
19 plaintiff Alli Katt, appeals from that portion of the June 26,
20 2001 judgment of the United States District Court for the
21 Southern District of New York (Gerard E. Lynch, Judge) which
22 vacated an award of punitive damages against the City. In
23 response, defendants move to certify the question of whether
24 punitive damages are available against a municipality under the
25 New York City Human Rights Law.

1 * The Honorable Fred I. Parker died on August 12, 2003.
2 Prior to his death he fully participated in the consideration and
3 decision of this case and prepared this opinion.

1 MOTION GRANTED and QUESTION CERTIFIED.

2 SCOTT SHORR, ESQ., Corporation Counsel's
3 Office, City of New York, New York, NY for
4 Defendants-Appellants-Cross-Appellees.

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6 SCOTT SAMAY, ESQ., Kirkland & Ellis, New
7 York, NY for Plaintiff-Appellee-Cross-
8 Appellant.

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10 F.I. Parker, Circuit Judge:

11 Defendants-appellants-cross-appellees, the New York City
12 Police Department ("the City") and Anthony DiPalma, appealed from
13 that portion of the June 26, 2001 judgment of the United States
14 District Court for the Southern District of New York (Gerard E.
15 Lynch, Judge) that denied their motion for a new trial after a
16 jury verdict on plaintiff Alli Katt's claim of a hostile work
17 environment in violation of federal, state and city law.
18 Defendants argued that the district court abused its discretion
19 in admitting certain evidence and therefore a new trial was
20 required. We affirmed the district court's decision denying a
21 new trial in an earlier summary order filed on April 2, 2003.
22 Krohn v. New York City Police Dep't, 60 Fed. Appx. 357 (2d Cir.
23 2003).

24 Katt¹ cross-appeals, challenging that portion of the June
25 26, 2001 judgment that vacated the award of punitive damages

1 ¹ Paul A. Krohn, bankruptcy trustee for Alli Katt, has been
2 added as a plaintiff-appellee-cross-appellant in this case.
3 Consistent with the parties' briefs and our summary order,
4 however, we will refer to plaintiffs collectively as "Katt."

1 against the City, and also the subsequent district court order
2 denying Katt's motion for reconsideration of the decision to
3 vacate the punitive damages award. In answer to Katt's cross-
4 appeal, the City argues that we should certify the question of
5 whether punitive damages are available against the City under New
6 York City Human Rights Law, New York City Admin. Code Sec. 8-101,
7 et seq., ("NYCHRL"), to the New York Court of Appeals.

8 The earlier summary order affirmed the district court's
9 denial of a new trial, and reserved decision on the plaintiffs'
10 cross-appeal and the defendants' motion to certify. Because of
11 an absence of New York case law regarding the question of whether
12 punitive damages against a municipality are available under the
13 NYCHRL, we certify the following question to the New York Court
14 of Appeals: Can a person claiming gender-based employment
15 discrimination recover punitive damages from the City of New York
16 under section 8-502(a) of the New York City Human Rights Law,
17 N.Y.C. Admin. Code § 8-502(a)?

18 I. BACKGROUND

19 In 1995, Alli Katt filed a complaint against the City and
20 various city employees, alleging that, as a civilian employee of
21 the New York City Police Department, she had been subjected to
22 sexual harassment and a sexually hostile work environment.
23 Originally, Katt's then-pro se complaint named several defendants
24 and included claims under a range of federal and state anti-

1 discrimination and civil rights laws. However, by the time of
2 the trial in 2000, she had retained counsel and only violations
3 of 42 U.S.C. § 1983, the New York State Human Rights Law, N.Y.
4 Exec. Law § 290, et seq., and § 8-502 of the NYCHRL remained.
5 The defendants were the City and Katt's former supervisor, Lt.
6 Anthony DiPalma.

7 At trial, Katt presented evidence of extensive and pervasive
8 sexual harassment and was awarded \$400,000 in compensatory
9 damages against both defendants, and \$1,000,000 in punitive
10 damages against the City alone. The City and DiPalma then moved
11 for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50,
12 or, alternatively, for the grant of a new trial or to set aside
13 the verdict pursuant to Fed. R. Civ. P. 59. The City also
14 challenged the punitive damages award, which had been awarded
15 pursuant to the NYCHRL. As the parties agree, neither 42 U.S.C.
16 § 1983 nor N.Y. Exec. Law § 290 authorizes the award of punitive
17 damages against a municipality. The district court granted the
18 City's motion to set aside the punitive damages award, pursuant
19 to Fed. R. Civ. P. 59(b), based on its conclusion that the NYCHRL
20 also did not authorize an award of punitive damages, and denied
21 the City's motion in all other respects.² Judgment was entered

1 ² The court noted its surprise at the lack of direct
2 authority resolving the punitive damages issue, "It is somewhat
3 surprising that this issue appears to be one of first impression
4 in this or any other court. Because the issue is purely one of
(continued...)

1 on June 26, 2001.

2 On July 12, 2001, Katt filed a timely motion for
3 reconsideration of the decision to vacate the punitive damages
4 award, pursuant to Fed. R. Civ. P. 59(e) and Fed. R. Civ. P.
5 60(b). Her motion was based primarily upon a letter written to
6 Judge Lynch from Craig Gurian, a lawyer who identified himself as
7 the principal author of the NYCHRL provisions at issue, and
8 asserted that the ordinance had been intended to authorize
9 punitive damages against the city. On August 7, 2001, the
10 district court denied Katt's motion for reconsideration.

11 As noted above, we have previously ruled upon the City's
12 appeal and this opinion addresses Katt's cross-appeal, timely
13 filed on August 28, 2001. The cross-appeal is from the district
14 court's decision to set aside the punitive damages award, and
15 from its denial of her motion for reconsideration. In June 2002,
16 the City filed a motion, pursuant to this Court's Rule § 0.27,
17 for an order to certify the question of whether the NYCHRL
18 authorizes recovery of punitive damages from the City of New York
19 for violations of that ordinance.

20
21 II. ANALYTICAL FRAMEWORK

22 A. Standard of Review

1 ²(...continued)
2 state law, with ramifications for the allocation of scarce public
3 (state and local) resources, it would surely be best resolved by
the courts and legislative authorities of New York."

1 This court reviews questions of statutory interpretation de
2 novo, United States v. Pettus, 303 F.3d 480, 483 (2d Cir. 2002),
3 but defers to state court interpretations of state and local
4 laws. Yoon v. Fordham Univ. Faculty & Admin. Ret. Plan, 263 F.3d
5 196, 203 (2d Cir. 2001) ("[I]t is well-established that the
6 controlling interpretation of state laws should normally be given
7 by state rather than federal courts.").

8 B. Certification Generally

9 "Where an 'unsettled and significant question of state law .
10 . . will control the outcome of [the] case, . . . we may certify
11 that question to the New York Court of Appeals." Baker v. Health
12 Mgmt. Sys., 264 F.3d 144, 153 (2d Cir. 2001) (citing 2d Cir. R. §
13 0.27; N.Y. Comp. Codes R. & Regs. tit. 22, § 500.17 (2000)
14 (certification is appropriate "[w]henever it appears . . . that
15 determinative questions of New York law are involved in the cause
16 pending before it for which there is no controlling precedent of
17 the [New York] Court of Appeals")). Certifying a question is
18 proper "where [a] statute's plain language does not indicate the
19 answer, or when [we are] presented with a complex question of New
20 York common law for which no New York authority can be found."
21 Riordan v. Nationwide Mut. Fire Ins. Co., 977 F.2d 47, 51 (2d
22 Cir. 1992).

23 Certification is a discretionary procedure, but questions
24 "are not to be routinely certified to the highest court[] of New

1 York . . . simply because a certification procedure is
2 available." Kidney by Kidney v. Kolmar Labs., Inc., 808 F.2d
3 955, 957 (2d Cir. 1987). Factors justifying certification
4 include "the absence of authoritative state court interpretations
5 of the state statute, the importance of the issue to the state
6 and the likelihood that the question will recur, and the capacity
7 of certification to resolve the litigation." Green v.
8 Montgomery, 219 F.3d 52, 60 (2d Cir. 2000). Additionally, we
9 assess whether the question implicates issues of state public
10 policy. Home Ins. Co. v. Am. Home Prods. Corp., 873 F.2d 520,
11 522 (2d Cir. 1989) (certifying a question because it "directly
12 involved the application of an important public policy of the
13 State of New York" and "[t]here [was] no precedent on the issue .
14 . . and New York has a strong interest in deciding the issue
15 certified rather than having the only precedent on point be that
16 of the federal court, which may be mistaken").

17 III. DISCUSSION

18 A. Damages Against a Municipality Under New York Law

19 When determining whether damages are available against a
20 municipality, under New York law, "a statute in derogation of the
21 sovereignty of a State must be strictly construed, [and] waiver
22 of immunity by inference [is] disfavored." Sharapata v. Town of
23 Islip, 56 N.Y.2d 332, 336, 437 N.E.2d 1104, 1106, 452 N.Y.S.2d
24 347, 349 (1982). Thus, to determine whether punitive damages are
25

1 available here, we must assess whether the NYCHRL has clearly
2 derogated sovereign immunity and submitted the City to liability
3 for punitive damages.

4 B. Text of NYCHRL

5 Beginning, as we must, with the text of the statute, see
6 Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985), we
7 find the wording inconclusive. NYCHRL's damages provision does
8 include punitive damages:

9 Except as otherwise provided by law, any person claiming
10 to be aggrieved by an unlawful discriminatory practice
11 as defined in chapter one of this title or by an act of
12 discriminatory harassment or violence as set forth in
13 chapter six of this title shall have a cause of action
14 in any court of competent jurisdiction for damages,
15 including punitive damages . . . with respect to such
16 alleged unlawful discriminatory practice or act of
17 discriminatory harassment or violence.

18 NYCHRL § 8-502(a). However, nowhere in the statute do we find an
19 overt indication of intent to subject municipalities to punitive
20 damages awards.

21 Under NYCHRL, it is an unlawful discriminatory practice
22 "[f]or an employer or an employee or agent thereof" to discharge
23 or discriminate "in competition or in terms, conditions or
24 privileges of employment" against a person on the basis of, among
25 other things, gender. NYCHRL § 8-107(1)(a). However, the
26 statute does not define the term "employer." Further, although
27 the NYCHRL defines the terms "covered entity" and "person," to
28 explicitly include "governmental bodies [and] agencies," see id.

1 § 8-102(2), (17), and provides that covered entities and persons
2 must comply, neither term is used to define potential defendants
3 subject to punitive damages. Thus, while one might reasonably
4 read the language as including municipalities, even accepting
5 that reading, it is not at all clear whether such an
6 interpretation constitutes the clear derogation of sovereign
7 immunity that New York law requires. Therefore, our analysis of
8 the statutory language is inconclusive.³

9 C. New York State Case Law

10 Although “we will not certify questions of law where
11 sufficient precedents exist for us to make that determination,”
12 McCarthy v. Olin Corp., 119 F.3d 148, 154 (2d Cir. 1997), we find
13 none here. The New York Court of Appeals has indicated that
14 punitive damages could be assessed against a municipality if the
15 requisite clear legislative intent was present in the governing
16 statute. See Sharapata, 56 N.Y.2d at 336, 437 N.E.2d at 1106, 452
17 N.Y.S.2d at 349. However, that court has not yet found
18 sufficient legislative intent in any law to override the
19 presumption against a waiver of municipal immunity. See, e.g.,
20 Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 70 N.Y.2d 382,

1 ³ It is conceivable that we might delve deep into the
2 legislative history of the ordinance as suggested by Katt, with
3 her reliance on Mr. Gurian’s account of NYCHRL’s inception and
4 passage. However, given the fact that this is a matter of
5 undecided state law which implicates public policy and affects
6 municipalities, certification precedent, as outlined above,
7 strongly suggests that it is preferable to certify the
8 interpretative question to the New York Court of Appeals.

1 388, 516 N.E.2d 190, 192-93, 52 N.Y.S.2d 653, 655-56 (1987);
2 Sharapata, 56 N.Y.2d at 336, 437 N.E.2d at 1106, 452 N.Y.S.2d at
3 349. Further, while New York's lower courts generally assume
4 that no punitive damages will lie against a municipality or its
5 agencies, see, e.g., Karoon v. New York City Transit Auth., 241
6 A.D.2d 323, 659 N.Y.S.2d 27 (1st Dep't 1997); Hargraves v. Bath
7 Cent. Sch. Dist., 237 A.D.2d 977, 654 N.Y.S.2d 539 (4th Dep't
8 1997), one city court has permitted the imposition of punitive
9 damages against a city agency, apparently assuming that the
10 NYCHRL authorized punitive damages against city agencies to the
11 same extent as against private defendants. See Grullon v. South
12 Bronx Overall Econ. Dev. Corp., 185 Misc. 2d 645, 712 N.Y.S.2d
13 911 (N.Y. City Civ. Ct. 2000). Where there is no definitive
14 state court authority on an issue, and the lower state courts are
15 split in their approach, certification of the question to the
16 state's highest court is appropriate. See Green, 292 F.3d at 60;
17 Riordan, 977 F.2d at 51.

18 Moreover, the state courts have indicated that the question
19 now before us raises significant public policy concerns.
20 Specifically, the New York Court of Appeals has written that "the
21 twin justifications for punitive damages -- punishment and
22 deterrence -- are hardly advanced when applied to a government
23 unit," Sharapata, 56 N.Y.2d at 338, 437 N.E.2d at 1107, 452
24 N.Y.S.2d at 350, and that such damages ultimately "punish only

1 the innocent taxpayers of New York State.” Clark-Fitzpatrick, 70
2 N.Y.2d at 388, 516 N.E.2d at 192-93, 52 N.Y.S.2d at 655-56.

3 For the reasons detailed above, we believe that the New York
4 Court of Appeals can best resolve the issues of state common law
5 and policy that are implicated by this question. See, e.g.,
6 Riordan, 977 F.2d at 51; Home Ins. Co., 873 F.2d at 522.

7 IV. CONCLUSION

8 Because of the absence of authoritative state court
9 interpretations of the NYCHRL on the question of whether punitive
10 damages are available against a municipality, the importance of
11 the question and its policy implications to the state, the
12 likelihood that the question will recur, and the fact that the
13 answer will resolve this litigation, we hereby respectfully
14 certify the following question to the New York Court of Appeals:
15 Can a person claiming gender-based employment discrimination
16 recover punitive damages from the City of New York under section
17 8-502(a) of the New York City Human Rights Law, N.Y.C. Admin.
18 Code § 8-502(a)?

19 The certified question may be deemed expanded to cover any
20 further pertinent question of New York law involved in this
21 appeal that the Court of Appeals chooses to answer. This panel
22 retains jurisdiction and will consider any issues that may remain
23 on appeal once the New York Court of Appeals has either provided
24 us with its guidance, or declined certification.

It is therefore ordered that the Clerk of this Court transmit to the Clerk of the Court of Appeals of the State of New York a Certificate, as set forth below, together with a complete set of briefs, appendices, and record filed in this Court by the parties.

CERTIFICATE

The foregoing is hereby certified to the Court of Appeals of the State of New York, pursuant to 2d Cir. R. § 0.27 and N.Y. Comp. Codes R. & Regs. tit. 22, § 500.17, as ordered by the United States Court of Appeals for the Second Circuit.